No. 9775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation), *Appellant,*
vs.
IRENE ZEHNLE and JERRY ZEHNLE, a Minor, by his Guardian Ad Litem, IRENE ZEHNLE, *Appellees.*

BRIEF FOR APPELLANT.

HORACE B. WULFF,
DEVLIN & DEVLIN & DIEPENBROCK,
California State Life Building, Sacramento 14, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

I. Page

Jurisdiction 1

II.

Statement of the case 3

(a) History of the case 3

(b) Statement of facts 4

III.

Specifications of error 9

IV.

No proof that the plaintiff suffered a pecuniary loss by or through the death of his father 10

(a) No proof of loss of care, society, comfort and protection 12

(b) No proof of loss of support 17

V.

Verdict of $20,000.00 excessive 28

Conclusion 31

Table of Authorities Cited

Cases	Pages
Bond v. United R. R., 159 Cal. 270	29
Brown v. Beck, 63 Cal. App. 686	11
Burbidge v. Utah Light & Traction Co., 196 Pac. 506	15
Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1120, 77 A.L.R. 1439	29
Cinochio v. San Francisco, 149 Cal. 159	12
Cossi v. Southern Pacific Company, 110 Cal. App. 110	15
Dixon v. Dixon, 216 Cal. 440	22
Ex parte Miller, 109 Cal. 643	19
Fagan v. Fagan, 43 Cal. App. (2d) 189	22
Federal Mutual Insurance Company v. Industrial Accident Commission, 195 Cal. 283	22
Hoffman v. Southern Pacific Co., 215 Cal. 454	31
Johnson v. The Western Air Express Corporation, 45 Cal. App. (2d) 614	11
Kit v. Crescent Creamery, 87 Cal. App. 563	29
Lewis v. Lewis, 174 Cal. 336	18, 20
Llewellyn Iron Works v. Industrial Accident Commission, 191 Cal. 28	22
Pacific Gold Dredging Co. v. Industrial Accident Commission, 184 Cal. 462	20
Parmley v. Pleasant Valley Coal Co. (Sup. Court of Utah), 228 Pac. 557	11
Powers v. Sutherland Auto Stage Co., 190 Cal. 487	13, 26
Sanfilippo v. Lesser, 59 Cal. App. 86	14
Selfridge v. Paxton, 145 Cal. 713	19
Sneed v. Marysville Gas etc. Co., 149 Cal. 704	11
Watkins v. Clemmer, 129 Cal. App. 567	22, 26
White v. White, 83 Cal. App. 356	22, 25

Statutes Pages

Civil Code, Section 196 ..... 17, 19, 26, 28
Civil Code, Section 207 17
Code of Civil Procedure, Section 377..... 10
Compiled Laws of the State of Utah (1917), Section 6505... 10, 30

Judicial Code, Section 24 (1b) amended, Title 28, United States Code Annotated, Section 225 (a)..... 2
Judicial Code, Section 128 (a), Title 28, United States Code Annotated, Section 225 (a) 2

Penal Code of California, Section 270..... 25, 26

No. 9775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation),	*Appellant,*
vs.	
IRENE ZEHNLE and JERRY ZEHNLE, a Minor, by his Guardian Ad Litem, IRENE ZEHNLE,	*Appellees.*

BRIEF FOR APPELLANT.

I.

JURISDICTION.

This is an appeal from a judgment made and entered by the United States District Court, in and for the Northern Division of the Northern District of California, upon a verdict of a jury against the appellant (defendant in the lower Court) in favor of Jerry Zehnle, a minor, in the sum of twenty thousand dollars ($20,000.00). The action was brought to recover an alleged pecuniary loss suffered by Jerry Zehnle, a minor, because of the death of his father,

Joseph John Zehnle, whose death occurred while a passenger on appellant's passenger train, No. First 21, when the rear end of said train was struck by appellant's train No. Second 21, in the vicinity of Bagley, Utah.

This action was originally commenced in said United States District Court by Irene Zehnle (as the alleged widow of Joseph John Zehnle) and Jerry Zehnle, a minor (as the son of Joseph John Zehnle) by his guardian ad litem, Irene Zehnle, residents of the State of California, against the appellant, a resident of the State of Kentucky. There was, therefore, a controversy between citizens of different states. (R. 2.) Irene Zehnle had obtained a decree of divorce from said Joseph John Zehnle on November 27, 1944, prior to the commencement of this case. She thereafter filed her voluntary dismissal of her alleged cause of action against said defendant. (R. 4.) The first amended complaint was filed, setting forth a single alleged cause of action in favor of Jerry Zehnle, a minor (R. 5), a resident of the State of California. (R. 6 and 8.)

The jurisdiction of said United States District Court was founded upon Judicial Code, Sec. 24 (1b) amended, Title 28, United States Code Annotated, Sec. 225 (a). The jurisdiction of the Circuit Court of Appeals to review the judgment on appeal from said District Court is based upon Judicial Code Sec. 128 (a), Title 28, United States Code Annotated Sec. 225 (a).

II.

STATEMENT OF THE CASE.

(a) History of the case.

This action was tried before a jury, based upon the issue made by the first amended complaint, and the appellant's answer thereto. The jury rendered its verdict in favor of the appellee (plaintiff below) and assessed damages against the appellant (defendant below) in the sum of twenty thousand dollars ($20,000.00) (R. 19), and upon such verdict a judgment was entered against the appellant in said amount (R. 20). Within the time allowed by law the appellant filed its motion for a new trial (R. 21). On May 17, 1946, said United States District Court, through Honorable Martin I. Welsh, made and filed its opinion and order that defendant's motion for a new trial be granted, and the verdict be vacated for the causes therein set forth materially affecting the substantial rights of the defendant (R. 24-37).

On June 11, 1946, through Honorable Judge Martin I. Welsh, said Court made and filed its order vacating the order granting a new trial, on the ground that the order granting a new trial on May 17, 1946, had been made and entered through inadvertence. It was further ordered that said motion for a new trial be restored to the calendar for further hearing. After further hearing said District Court, through Honorable Judge George B. Harris, made its order denying defendant's motion for a new trial (R. 38). Thereafter and at the time and in the manner required by law, the appellant filed this appeal.

(b) Statement of facts.

The trial of the issue of the alleged negligence of appellant was had upon evidence adduced pursuant to the written stipulation of the parties filed in said cause (R. 9-18). The complaint alleges, and the answer admits that Joseph John Zehnle was a passenger on December 31, 1944, on the appellant's westbound, first class, passenger train, known as train No. First 21. Said stipulation, in part, sets forth that said train departed westward from Ogden, Utah, at 4:38 A.M., and proceeded westward on the Southern Pacific's main line track, to a point 18.82 miles west of Ogden, Utah, and while moving at an estimated speed of eight miles an hour, it was struck in the rear and from the rear by Southern Pacific Company's train No. Second 21.

Southern Pacific train No. Second 21, a westbound, first-class mail-express-baggage train, departed westward from Ogden, Utah, at 4:50 A.M., on said day, on the same westbound track, and proceeded westward along said track to said point west of Bagley, Utah, where it struck the rear end of train No. First 21. The engineer of train No. Second 21, was dead before there was an opportunity to obtain any statement from him or testimony from him in respect to the operation of train No. Second 21. It was further stipulated that the only claim of negligence made by plaintiff is in respect to the conduct of the engine crews and train crews of trains Nos. First 21, and Second 21, after said trains left Ogden, Utah.

Since the appellant is not seeking on this appeal a reversal of the judgment upon the issue of negligence, as is more specifically shown by Statement of Points under Rule 75 (d) (R. 50), and the Statement of Points under Subd. D of Rule 19 of this Court (R. 109), it is not necessary to state herein the specific evidence in regard to the accident. Accordingly, this statement of facts is limited to the evidence concerning the points set forth in said statements.

Joseph John Zehnle and Irene Zehnle were married in Redwood Falls, Minnesota, on September 3, 1941 (R. 56), and following their marriage resided together on the farm of Mr. Zehnle's parents in Minnesota for a period of two months, or until some time in November (R. 60, 61, 70). In November, 1941, Mrs. Zehnle returned to Sacramento. Zehnle remained on the farm in Minnesota. During Mrs. Zehnle's sojourn in Sacramento, California, Jerry Zehnle was born on July 18, 1942 (R. 56). Mrs. Zehnle and her child remained in Sacramento until the child was one year old, when she rejoined her husband in Minnesota. The family lived together on said farm for eight months (R. 61, 71). Mrs. Zehnle and her child returned to Sacramento and remained there at all times thereafter excepting for a brief period when Mrs. Zehnle resided in the State of Nevada, and procured a decree of divorce from Zehnle which was entered on November 27, 1944. It thus appears that the married life of these parties extended over a period of three years, two months and twenty-one days, and during that period they were together for a period of only ten

months, eight of which were after the birth of the child. They were separated for two years, four months and twenty-one days.

During this period of separation Mrs. Zehnle testified that her husband contributed to her support, and the support of her son, in varying amounts from a low of twenty dollars ($20.00) per month to a high of fifty dollars ($50.00) per month (R. 61, 62); that it was entirely inadequate for their support, and that she supplemented the same by working (R. 70). She further testified that she did not know what her husband's earnings were during the time he was working on his parents' farm (R. 71).

In April, 1944, Zehnle entered the Merchant Marine (R. 59), and his total earnings or wages for eight months of that year amounted to nine hundred ninety-four and 81/100 dollars ($994.81), an average of one hundred twenty-four and 35/100 dollars ($124.35) per month (R. 59). Despite her testimony as to his general contributions, the evidence specifically shows through a series of letters (R. 79 to 87) that the only money Zehnle sent while in the Merchant Marine was one hundred dollars ($100.00). This is shown by a letter dated October 10, 1944, wherein it is stated:

> "I got paid today so I thought I would send you some money for Xmas, in case I don't get back in time. 50 is for you, Irene, and 50 is for Jerry * * * I sent 200 dollars home for my dad to keep for me until I get there." (R. 81).

A letter of November 10, 1944, shows that the decedent "bought Jerry a 25 dollar bond last trip"

(R. 83). In other words, these letters (which we must assume to be all that he wrote, because if she had received more, she would have introduced them) show that during the period of eight months he contributed only one hundred ($100.00) dollars to the support of his family. The decedent's utter failure and neglect to support his wife and child admittedly (R. 74) resulted in Irene Zehnle filing a complaint for divorce in the Second Judicial Court of the State of Nevada, in and for the County of Washoe. Her verified complaint for a decree of divorce contained the following allegations:

> "Paragraph IV: That there is no community property belonging to plaintiff and defendant.
>
> "V. That since the marriage of plaintiff and defendant as aforesaid, said defendant, for more than one year immediately preceding the commencement of this action has failed, refused and neglected, and still fails, neglects and refuses to provide plaintiff with the common necessaries of life, and that such failure and neglect is not the result of sickness or poverty on the part of defendant which he could not avoid by ordinary industry" (R. 72).

The prayer of said complaint prayed for the bonds of matrimony to be forever dissolved, and that the plaintiff be awarded the sole care, custody and control of the minor child of said parties.

Based upon said complaint and evidence adduced in support thereof, the said Nevada Court, on the 27th day of November, 1944, entered its decree of divorce, which in part provided:

"That she is entitled to a decree of divorce as prayed for in her complaint on the ground of defendant's failure and neglect to provide plaintiff with the common necessaries of life for more than one year immediately preceding the commencement of this action.

"Decree: Now, therefore, it is ordered, adjudged and decreed, that the bonds of matrimony and contract of marriage now existing between plaintiff, Irene Zehnle, and defendant, Joseph John Zehnle, be, and the same are hereby absolutely and forever dissolved and the parties hereto are restored to the status of unmarried and single persons.

"It is further ordered that plaintiff be, and is hereby awarded the sole care, custody, and control of Jerry Zehnle, the minor child of said parties.

"Done in open court this 27th day of November, 1944" (R. 74).

It will be noted by said decree that the sole care, custody and control of Jerry Zehnle was awarded to his mother, and that said decree made no provision requiring Zehnle to pay any sum whatsoever for the support of said minor child. There is no evidence in the record that after the death of Zehnle, the mother was unable to support her child. On the contrary she testified that she was able to support herself and child by working and from the insurance money she was receiving (R. 63). (The insurance was on the life of Joseph John Zehnle.)

The foregoing is all of the evidence introduced to prove what pecuniary loss, if any, was suffered by Jerry Zehnle by reason of the death of his father. There was some evidence that Zehnle had been planning and was ambitious for the child's future, and that he had the ordinary paternal attitude of a father for his child (R. 65 and 66).

III.

SPECIFICATIONS OF ERROR.

1. A verdict in the sum of twenty thousand dollars ($20,000.00) is against law, and the evidence is insufficient to justify the verdict, in that the evidence adduced at the trial failed to prove any pecuniary loss sustained by the plaintiff and proximately caused by the wrong complained of, as the record is devoid of any deprivation of anything to which the plaintiff would have been legally entitled, if his father had lived, and devoid of any deprivation of benefits which the plaintiff might reasonably have expected he would receive from the deceased had his life not been taken, in this

(a) In view of the fact that the plaintiff and the decedent, pursuant to the decree of divorce, would be obliged to live apart, nothing could be awarded to the plaintiff for the loss of the society, care, and comfort of and protection and education by the deceased;

(b) Under the evidence the plaintiff would not have been legally entitled to support from his father,

if he had lived, under the laws of the state of residence of the plaintiff, and hence no recoverable loss was suffered by his father's death.

2. The verdict in the sum of twenty thousand dollars ($20,000.00) is substantially disproportionate to the loss, if any, sustained by the plaintiff.

3. Excessive damages in favor of the plaintiff and against the defendant appearing to have been given under the influence of passion, prejudice and/or sympathy.

4. Errors in law occurring at the trial by rulings which sustained plaintiff's objection to questions propounded to Irene Zehnle relating to her verification of the original complaint, wherein she swore that she was the widow of Joseph John Zehnle, decedent. The questions were propounded for the purpose of impeaching the witness as to her truth, honesty and integrity.

IV.

NO PROOF THAT THE PLAINTIFF SUFFERED A PECUNIARY LOSS BY OR THROUGH THE DEATH OF HIS FATHER.

In actions for death, either under Section 377 of the Code of Civil Procedure of the State of California, or under Section 6505 of the Compiled Laws of the State of Utah (1917) (the state in which the accident occurred), the limit of recovery for an heir of a deceased person is the pecuniary loss sustained by such heir, and proximately caused by the wrong complained of. Pecuniary loss may be either a loss arising from

the deprivation of something to which plaintiff would have been legally entitled, if his father had lived or a loss arising from the deprivation of benefits which from all circumstances of the particular case it would be reasonably supposed the plaintiff would have received from the deceased, had his life not been taken.

Brown v. Beck, 63 Cal. App. 686, at 696;

Sneed v. Marysville Gas etc. Co., 149 Cal. 704 at 710;

Parmley v. Pleasant Valley Coal Co. (Sup. Court of Utah), 228 Pac. 557, on page 558 (it is shown that Section 6505 was originally adopted from Section 377 of the Code of Civil Procedure of the State of California in 1884).

Johnson v. The Western Air Express Corporation, 45 Cal. App. (2d) 614 at 622, clearly states the rule as follows:

> "The measure of damages in such case is what the heirs were receiving at the time of the death of the deceased and what such heirs would have received had decedent lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation."

Therefore, it is the pecuniary loss to an heir, by reason of the death, that is recoverable and that only. It follows that there can be no substantial recovery by an heir who has not suffered substantial pecuniary injury. In the absence of proof tending to show an actual damage or a probable loss with reasonable certainty resulting to plaintiff from the death, the jury

should be instructed that the heir's recovery must be limited to nominal damages. Mere speculative or conjectural possibilities of benefits to the parties complaining are not a proper basis for estimating damages resulting from a death. (*Cinochio v. San Francisco,* 149 Cal. 159 at 167.)

As shown above, pecuniary loss normally suffered by a minor child, by reason of the death of his father, is classified or segregated into two elements:

1. The deprivation of something to which plaintiff would have been legally entitled if his father had lived, that is, loss of a legally enforceable right of support.

2. Benefits which it could be reasonably expected plaintiff would have received if the decedent had lived, to-wit, care, society, comfort, protection and education.

It will first be shown, as the District Court instructed the jury, no damage could be found based upon any claim for loss of care, society, comfort and protection, and secondly, that there is utterly no proof of any substantial loss of support, because the decedent was not legally obliged to support his son.

(a) No proof of loss of care, society, comfort and protection.

As shown heretofore, the decree of divorce obtained by Irene Zehnle from her husband, Joseph John Zehnle, in part provided:

> "It is further ordered that plaintiff be, and is hereby awarded the sole care, custody and con-

trol of Jerry Zehnle, the minor child of said parties." (R. 74).

It will be noted that under said decree, there was no legal right given to Zehnle to visit his son at any time, but as stated in the decree, Irene Zehnle had the *sole* care, custody and control of said minor. Under such decree said minor child would not be a member of the decedent's household, nor could he reside with his father, if his father had lived, nor could the father have the right even to see the child without the mother's consent.

It is evident under the circumstances, that Zehnle (a resident of the State of Minnesota) would have had no opportunity to bestow upon his son (a resident of the State of California) his care, custody, comfort or protection. Under such circumstances the plaintiff cannot claim a pecuniary loss by being deprived of such society, comfort, care or protection which he would not have received, if his father had lived. Such is the holding of the California Courts:

In *Powers v. Sutherland Auto Stage Co.,* 190 Cal. 487, the facts were that the decedent and his wife had been living separate and apart, although not legally separated or divorced. In regard to the wife's right to recover for the loss of care, society, comfort and protection of the deceased, the Court stated:

> "In view of the fact that the plaintiff and deceased had been living apart, nothing could have been awarded to the plaintiff for the loss of the society, comfort and protection of the deceased.

> The amount awarded is solely attributable, therefore, to the loss by the death of the husband of the legally enforceable right of support against him."

In *Sanfilippo v. Lesser,* 59 Cal. App. 86, there was involved an action for the death of a mother in which the husband and a minor daughter, seventeen (17) years old, were plaintiffs. The Court, in discussing the question of the recovery of pecuniary loss for the deprivation of society, comfort and protection of the deceased, said:

> "It appears therefrom that there is no evidence that Philip Sanfilippo, the husband, was living with the deceased at the time of her death or that her society was of a pecuniary value to him or that she rendered any services to him * * * as to the minor child seventeen (17) years of age, there is also no evidence that she resided with her mother and not the faintest suggestion that she suffered any pecuniary loss by her death. It is always to be borne in mind that no recovery can be had for grief, sorrow, and mental suffering of the heirs of the deceased."

The Court then, on page 91, recognized that there may be a pecuniary loss to the wife or child from the death of the husband arising from the deprivation of the society, comfort and protection of the deceased, and in this regard the Court stated:

> "But this is not a universal right existing in every case. It is allowable only where the 'circumstances' showing a reasonable probability that the society, comfort and protection afforded

> to the surviving parent or wife was of such a character that it would be of a pecuniary advantage to the parent or wife, and that a deprivation thereof would entail a pecuniary loss to them."

In *Cossi v. Southern Pacific Company,* 110 Cal. App. 110, there was involved an action by the father for the death of his ten (10) year old son. The mother and the father were separated. The mother and her three children, including the deceased, were living apart from the husband. The Court, in denying pecuniary loss to the husband for the death of his son, stated:

> "It was incumbent upon appellant to prove by a preponderance of the evidence that pecuniary injury was reasonably certain to be suffered by him from the death of his child. The jury may well have concluded from the facts before them that father and son were so little interested in one another that there was no reasonable certainty that the continued life of the son would be of any pecuniary value to the father."

Such is also the holding of the Utah Courts, as shown in the case of *Burbidge v. Utah Light & Traction Co.,* 196 Pac. 506. The decedent had lived separately and apart from his three minor children for about eighteen months prior to his death, and during that period not only did he not support his children, but had not associated with them. The trial Court gave an instruction that there was no evidence of loss of society and companionship, and hence no recovery

of damages could be had on that ground. The Supreme Court on appeal, in regard to the subject (page 558) said:

> "The court instructed the jury that the plaintiff was not entitled to recover for loss of companionship and society of the deceased. No complaint is made of that instruction. We assume that none could have been made under the circumstances shown by the testimony."

In instructing the jury in the case at bar, the District Court recognized the law hereinabove stated and instructed the jury as follows:

> "If you find that in all probability Jerry Zehnle would continue during his minority to live apart from his father (if the latter had lived), then I instruct you that nothing can be awarded to plaintiff for the loss of society, comfort and protection of the deceased, and the amount of your award, if any, must be solely attributable to the loss of the legal enforceable right of support, if any there may be."

The evidence shows that at the time of Zehnle's death the decree was in full force and effect, and that he had not lived with his wife and child for approximately a year prior to the divorce. Hence there was no evidence of any kind indicating any possibility of the remarriage or the change of custody of Jerry Zehnle from his mother to his father. Under such circumstances existing at the time of death, there was no basis for the recovery of loss of care, comfort, society and protection. Therefore, there remains for

consideration one other element of pecuniary loss, that is, the loss of legally enforceable right of support.

(b) No proof of loss of support.

The question under this heading is whether or not Jerry Zehnle suffered a loss of a legally enforceable right of support against his father, by reason of the latter's death.

As stated heretofore by the decree of divorce entered on November 27, 1944, the plaintiff therein, Irene Zehnle, was awarded the sole care, custody and control of the minor child. The decree made no provision requiring the defendant therein to pay any sum whatsoever for the support of his said minor child.

In view of the fact that the complaint alleges, and the answer admits that the plaintiff was a resident of the State of California, the question of whether or not Zehnle was obligated to support his said minor child would depend upon California law, the law of the state of the residence of said minor.

Section 196 of the Civil Code of the State of California, provides:

> "*The parent entitled to the custody of a child* must give him support and education suitable to his circumstances."

Section 207 of the Civil Code provides:

> "If the parent neglects to provide articles necessary for said child *who is under his charge,* according to his circumstances, a third person

> may in good faith supply such necessities, and recover the reasonable value thereof from the parent."

Under said substantive law of the State of California, and because the decree of divorce awarded the sole custody to the mother without any provision for support of the child, the father was released from all legal obligation to support his child, nor could the father have been held liable for necessities furnished said child by third persons.

Earlier cases of the Appellate Courts of the State of California held without any qualification that, the father of a minor child was under no obligation to provide for his child any support or education beyond that which might be directed by the Court which granted the divorce, either in its decree or by subsequent modifications. Such a case is *Lewis v. Lewis,* 174 Cal. 336, where there was involved an action by a minor daughter of the defendant to compel her father to contribute to her support and education during minority. The mother had obtained a final decree of divorce from the defendant, which awarded the exclusive custody and control of the plaintiff to the mother and also provided that the defendant should pay to plaintiff for the maintenance and support of herself and minor child, the sum of ten hundred fifty dollars ($1,050.00) in monthly installments. These payments had been made in full before the commencement of the present action. It was alleged and found that the plaintiff (the minor) was without means and

not able, by reason of her tender age, to maintain, support and educate herself; that her mother did not have sufficient means to enable her to provide adequately for the plaintiff, and the defendant was well able to provide for her. Judgment was given in favor of the plaintiff, requiring the defendant to pay a given sum for such support. Upon appeal, the Court, in reversing the lower Court, referred to Section 196 of the Civil Code and then stated:

> "The decisions of this Court are clear to the effect that when there has been a decree of divorce and such decree vests the custody of the minor child in the mother, the father is under no obligation to provide for such children any support or education beyond that which may be directed by the Court which granted the divorce either in its decree or by subsequent modifications."

The Court then cited the earlier cases, to-wit: *Ex parte Miller,* 109 Cal. 643 at 648; *Selfridge v. Paxton,* 145 Cal. 713 at 716, and in reversing the judgment of the lower Court, stated (page 341):

> "The authorities cited leave no avenue of escape from the conclusion that the judgment here appealed from cannot be sustained. The decree of divorce gave the custody of the plaintiff to the mother and made no provision for plaintiff's support, beyond a requirement for the payment by the defendant of sums which have been fully paid by him. The defendant is therefore under no legal obligation to support the plaintiff. The plaintiff is not, however, without remedy. The court which granted the divorce has full power to modify its decree by making such orders as

> may be just and proper in view of the conditions shown to exist at the time application may be made to it."

The doctrine in *Lewis v. Lewis,* supra, was modified by the decision of the Supreme Court of such state in *Pacific Gold Dredging Co. v. Industrial Accident Commission,* 184 Cal. 462, which established the principle that under similar circumstances the father is absolved from his legal duty to provide support to his minor child, if such child has other sources of maintenance, but is not absolved from such legal duty if said child has no other source of maintenance. In other words, the minor could not be deprived of his natural right to turn to his father "if the substituted source of supply fails." The *Pacific Gold Dredging Company* case involved a proceeding to review the action of the Industrial Accident Commission in awarding compensation to a minor under the Workmen's Compensation Act on account of the accidental death of his father. The undisputed facts disclosed that the mother of the minor, procured a decree of divorce from the deceased, and the custody of the minor son was therein awarded to the mother. About two (2) years later, the mother placed the boy in an orphanage in Portland, Oregon, and then disappeared, and since that time, no one had any information or knowledge of her existence or whereabouts. The father had also disappeared until some ten (10) years later, and thereafter the father contributed money to his son on several occasions. In 1919, the father outfitted the boy with clothing and sent him money for the travel-

ing expenses to California where he joined his father. They lived together in a cabin for three (3) months, and the father supported the boy, and it was then tentatively agreed between father and son that the father would move to Westwood where he would obtain work and send the boy to school. In the interim, he arranged for the boy to stay in the home of a person with the understanding that the boy was to work for his board and also go to school. This was the situation when the father met his accidental death. The Industrial Accident Commission held that the *boy was a dependent of the father* and made an award accordingly to him. On appeal, the Court referred to Section 196 of the Civil Code for the proposition that when a parent is deprived of the custody of his child, and therefore of his services and earnings, he is no longer liable for his support and education. Then the Court stated the following which has been quoted in many cases thereafter, that is:

> "We find no authority for holding that, as between parent and child, the father is absolved from his legal duty to provide support to his minor child *who has no other source of maintenance,* because on account of his own fault, he has been deprived of the custody of such child. Both a legal and moral obligation rests upon a father to support his minor children. And while, as between himself and third parties, that obligation may be shifted in proceedings of divorce or guardianship, and he may, by misconduct, forfeit his right to the custody of his child, it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to

turn to his father for maintenance, *if the substituted source of supply fails.*"

The above case has been approved and followed in the following cases:

Llewellyn Iron Works v. Industrial Accident Commission, 191 Cal. 28;

Federal Mutual Insurance Company v. Industrial Accident Commission, 195 Cal. 283;

Fagan v. Fagan, 43 Cal. App. (2d) 189;

Dixon v. Dixon, 216 Cal. 440;

Watkins v. Clemmer, 129 Cal. App. 567.

Each of these cases admittedly involved an impoverished and indigent minor child, whose substituted source of supply or support had failed. In *Watkins v. Clemmer,* supra, the Court after referring to the Civil Code sections and many of the cases hereinabove cited, stated (page 577):

"Under the statutory provisions and decisions to which we have referred, we are satisfied that the primary parental obligation in this case was with the mother, and will continue with her until the order (under section 138) is modified or vacated."

The case of *White v. White,* 83 Cal. App. 356, involved a set of facts practically identical to the facts in the case at bar. In this case there was involved an action brought by a minor child, appearing through her guardian, her mother (the divorced wife of the defendant) for an order compelling the defendant (the father of the child) to pay certain sums of money

for the support of the child. The mother and father of said child were divorced in the State of Texas, and by such decree the custody of the said child was awarded to the mother, without any provision being made in the decree for the father's support of said minor child.

The Court reviewed the cases in California, upon the question of the father's obligation, if any, to support his child under the circumstances therein involved. The Court then construed and applied the law of the state, as it should be applied in the case at bar. In restating the California law, the Court, on page 357, stated:

> "In such circumstances it appears to have been ruled directly by the higher courts of this state that a separate action by the child against the father to compel him to furnish support for the child will not lie. (*Lewis v. Lewis,* 174 Cal. 336 (163 Pac. 42); *Matter of McMullin,* 164 Cal. 504 (129 Pac. 773); *Ex parte Miller,* 109 Cal. 643, 648 (42 Pac. 428). See, also, *People v. Hartman,* 23 Cal. App. 72 (137 Pac. 611); *In re Perry,* 37 Cal. App. 189 (174 Pac. 105).)
>
> There is, however, later authority to the effect that because in a divorce proceeding the custody of a minor child of the parties has been awarded to the mother, does not relieve the father from his duty to support the child who has no other source of maintenance. (*Pacific Gold Dredging Co. v. Industrial Acc. Comm.,* 184 Cal. 462 (13 A.L.R. 725, 194 Pac. 1); *Svoboda v. Superior Court,* 190 Cal. 727 (214 Pac. 440); *Llewellyn Iron Works v. Industrial Acc. Comm.,* 191 Cal.

28 (214 Pac. 846); *Federal Mutual L. I. Co. v. Industrial Acc. Comm.,* 195 Cal. 283 (233 Pac. 335).) * * *

On the hearing of the instant matter, which resulted in the order to which exception is taken by appellant, no evidence was introduced which showed that the child was in need of support from the defendant. To the contrary, the evidence was to the effect that the child was a remainderman of a one-fourth interest in an estate of the value of $250,000. Nor, aside from testimony that the wife was the owner of a one-fourth interest in the 'Octagon Drop Forge Co.,' was any showing made regarding the financial ability of the wife to provide the child with the necessaries of life.

In the face of the record and the law as hereinbefore noted, it was legally impossible that the relief for which plaintiff prayed be granted."

In other words, the law as restated in the above case, is that where the father has been deprived of the custody of his minor child by a decree of divorce awarding the custody of the child to the mother (without provision for the husband's contribution toward support) the father is absolved from his said duty to so support the child, unless the child *"has no other source of maintenance."* The burden of proof is upon the plaintiff, or the appellee here, to prove by a preponderance of the evidence that he would have had no other adequate source of maintenance, other than that which he would have received from his father, if he had lived. In other words, that his mother was unable to supply such maintenance, or such *"substituted source of supply fails."*

In the case at bar, there was no evidence in the record whatsoever, how or in what manner the plaintiff was supported or maintained from the date of the decree of divorce (November 27, 1944), to and including the date of Zehnle's death (December 31, 1944). The only evidence in regard to the maintenance of the child that appears in the record has reference to support subsequent to Zehnle's death, and the testimony in that regard is indeed meager. Mrs. Zehnle testified as follows:

> "Q. Now subsequent to Mr. Zehnle's death, what has been the principal means of your support?
>
> A. Well, between working, and then the insurance that I had from his death." (R. 63).

In other words, there is involved in this case a similar situation as that involved in *White v. White,* supra, where there was no "showing made regarding the financial ability of the wife to provide the child with the necessities of life."

The above and foregoing authorities have not in any way been affected or overruled by subsequent cases, which either involved impoverished or indigent minors, or were cases where "the substituted source of supply fails". Nor have they been affected or overruled by the 1923 amendment to Section 270 of the Penal Code of the State of California.* Said section is purely a criminal section, and does not deal with the civil obligations to a minor child by its

---

**White v. White,* supra, decided four years after the adoption of said Section 270 of said Penal Code.

parent. As stated in *Watkins v. Clemmer,* supra, at page 526:

> "Section 270 of the Penal Code required the father to provide for his minor child regardless of the property settlement, alimony or other similar orders. *It is, of course, a criminal statute.*"

A criminal statute does not provide a procedure or means by which civil rights are created or become enforceable. A minor child could not obtain, through a civil procedure or otherwise, a money judgment for his support because of a violation of the provisions of said Section 270, but he could cause his father to be punished by fine or imprisonment for such a violation. Moreover, Section 196 of the Civil Code which places the obligation of support of a minor child upon the parent to whom the child's custody has been given, has not been repealed, expressly or impliedly by said Penal Code, Section 270, but to the contrary, remains in full force and effect.

In an action for the death of the father, the child can only recover that which he has lost, or, stated in *Powers v. Sutherland Auto Stage Co.,* supra, "the loss by the death of the husband of the legal enforceable right of support against him." By the decree of divorce the obligation of the support of the plaintiff was transferred from the father to the mother. Since said decree was not modified or amended and the conditions and circumstances existing at the time said decree was entered were not shown to have changed or varied and since there is no evidence that it could be reasonably expected that such substituted

source of support might fail, it must necessarily be concluded that said minor did not suffer a pecuniary loss by being deprived of his father's support.

Furthermore, there is no evidence, which could support an inference that the deceased, if he had lived, would have voluntarily assumed the obligation to support his son. The record shows that the father had no knowledge of the entry of the divorce,* nor that his wife assumed the obligation of the support of their child. There is no expression of his reaction to the divorce. It is known that the deceased, during the period of his marriage, did not perform his legal obligation to support his wife and child; that during the last eight months of his marriage he received wages in the sum of nine hundred ninety-four and 81/100ths dollars ($994.81), and from said earnings, he paid only one hundred dollars ($100.00) to his wife for their support. It was likewise known that the wife had to support herself and son (except for such small contributions), and that because of his failure to provide her and their son with the necessities of life, she divorced him, and willingly assumed the obligation to support both herself and her child.

From Zehnle's past conduct it appears natural that he would not voluntarily do that which he was not legally bound to do. He had refused to perform that obligation, when he was legally bound to perform the same.

---

*The record shows that Zehnle received a summons (R. 83). The fact that he did not know that a decree of divorce had been entered, could be inferred from his letter of December 12, 1944 (R. 77).

V.

VERDICT OF $20,000.00 EXCESSIVE.

If by any hypothesis, the appellant is in error in its contention that the decedent was legally obliged to support his son, it must be held that a verdict in the sum of twenty thousand dollars ($20,000.00) was excessive as a matter of law and was such as to suggest, at first glance, passion and prejudice on the part of the jury. Mrs. Zehnle testified that she had no knowledge of Zehnle's earnings from the date of their marriage (September 3, 1941) (R. 56), to the date he left his parents' farm in Minnesota, in April, 1944 (R. 71). There is no evidence of whether he was earning or would earn in the future five hundred dollars ($500.00), or ten thousand dollars ($10,000.00) annually. His financial circumstances were not revealed.

Under Section 196 of the Civil Code of the State of California, a parent must give his child support and education *"suitable to his circumstances."* There is nothing to gauge or determine what the plaintiff was entitled to receive from his father, in the absence of evidence as to the father's financial circumstances. The only item of evidence in this regard is Mrs. Zehnle's testimony that upon her return to California in the forepart of 1944, Zehnle contributed between twenty dollars ($20.00) and fifty dollars ($50.00) per month to her and her child's support (R. 61), and plus the further evidence that from the time the decedent entered the Merchant Marine, in April, 1944, to the date of death, she received the sum of one hundred dollars ($100.00) for their joint support.

In accordance with the accepted annuity tables (on a four per cent (4%) interest basis), the net worth of an annuity of one dollar, payable at the end of each year for an eighteen year period (a period in which the plaintiff would reach his majority) is $12.65929, and then dividing the present value of an annual annuity of one dollar ($12.65929), into $20,000.00, will give the amount that the jury found that the deceased would have contributed annually to his son, if he had lived, which is the sum of $1579.77 per year, or a monthly contribution of $131.65.

It is universally held, both by State and Federal jurisdictions that in death actions, the plaintiff is not entitled to a present judgment (payable now and in full) for the full amount of such estimated future receipts, but only for the present value thereof.

Bond v. United R. R., 159 Cal. 270 at 286;

Kit v. Crescent Creamery, 87 Cal. App. 563 at 582;

Chesapeake & O. R. Co. v. Kelly, 241 U. S. 485, 60 L. Ed. 1120, 1122, 77 A.L.R. 1439.

With the existing status of the record and without proof of the financial circumstances of the decedent (either present or prospective) the jury could not have arrived at a verdict in the sum of twenty thousand dollars ($20,000.00), except through pure speculation and conjecture, for the self-evident reason, that there is no proof that the deceased had, or would have in the future, if he had lived, earned a sufficient sum, after the payment of income taxes, to be able to have paid a monthly contribution to his son in the amount

of one hundred thirty-one and 65/100 dollars ($131.65), or any other substantial sum. We must ascertain the future by looking through the present, into the past, and find that in the past Zehnle's maximum contribution to the support of both his wife and son was between twenty dollars ($20.00) and fifty dollars ($50.00) per month, an average of thirty-five dollars ($35.00) per month. There was nothing in the record that would warrant the finding that the deceased, if he had lived, would have been able to earn a sufficient net sum annually, to enable him to almost quadruple his former contributions.

The amount of said verdict clearly points inescapably to sympathy by the jury for said minor child. This conclusion is supported by the finding contained in the opinion and order of the Court, by Honorable Martin I. Welsh, Judge, dated May 17, 1946, where the Court found:

> "The Court observed the interest manifested in the minor plaintiff by the jurors. It cannot do otherwise than conclude that such interest outweighed, and resulted in a disregard of, the evidence and the instructions. Such disregard resulted in an excessively high verdict."

In view of the fact that there was no evidence adduced, which would reveal the circumstances of the case upon which the jury could determine the amount of the damages that may be just (Section 6505, Comp. Laws Utah 1917), it appears to be certain that said judgment was either based upon sympathy for the plaintiff or upon passion or prejudice. Therefore the

whole verdict should be declared set aside and the defendant given a day in Court before a fair and impartial jury.

If it be conceded for purposes of argument only, that there was adduced some evidence of allowable damages, then such evidence cannot support a verdict of twenty thousand dollars ($20,000.00). The discrepancy between the amount of the verdict, and the actual pecuniary loss (if any there was) is so great as to demonstrate that the verdict was entirely unwarranted. The case at bar gives rise to the same problem which confronted the Supreme Court of the State of California in *Hoffman v. Southern Pacific Co.,* 215 Cal. 454, at 460. In the last mentioned case the Court held that the discrepancy between a verdict for fifty thousand dollars ($50,000.00) and the reasonable amount of the damages was so great as to be entirely unwarranted, and therefore reduced the judgment to twenty-five thousand dollars ($25,000.00).

CONCLUSION.

It has been demonstrated herein, that the plaintiff has not suffered a pecuniary loss by being deprived of any loss of care, comfort, society or protection, and likewise that the deceased, if he had lived, would not have been legally obligated to support his son. The local law places the latter obligation upon the plaintiff's mother. Hence, there being no proof of any substantial pecuniary loss, the verdict should have been for a nominal amount only.

The alternative position has likewise been demonstrated, that is, if under local law, there was a legally enforceable obligation upon Zehnle to support his son, then appellee failed to prove the financial circumstances of the deceased; in other words the premise upon which the extent of his support must necessarily have to be based, was not proven.

If Zehnle's financial circumstances could have been inferred from the evidence, then the grossly excessive verdict is not supported by the evidence.

Under all of these contingencies said judgment should be reversed and the case remanded for a new trial.

Dated, Sacramento, California,
June 18, 1947.

Respectfully submitted,
HORACE B. WULFF,
DEVLIN & DEVLIN & DIEPENBROCK,
Attorneys for Appellant.